

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

MICHAEL K. KELLOGG  
PETER W. HUBER  
MARK C. HANSEN  
K. CHRIS TODD  
MARK L. EVANS  
STEVEN F. BENZ  
NEIL M. GORSUCH  
GEOFFREY M. KLINEBERG  
REID M. FIGEL

SUMNER SQUARE  
1615 M STREET, N.W.  
SUITE 400  
WASHINGTON, D.C. 20036-3209  
  
(202) 326-7900  
FACSIMILE:  
(202) 326-7999

HENK BRANDS  
SEAN A. LEV  
COURTNEY SIMMONS ELWOOD  
EVAN T. LEO  
ANTONIA M. APPS  
MICHAEL J. GUZMAN  
AARON M. PANNER  
DAVID E. ROSS  
RICHARD H. STERN, OF COUNSEL

August 16, 2001

VIA HAND DELIVERY

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12th Street, S.W., Room TW-A325  
Washington, D.C. 20554

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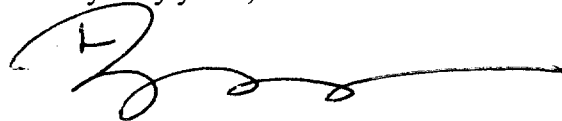
Re: *In the Matter of Carriage of Digital Television Broadcast Signals;  
Amendments to Part 76 of the Commission's Rules, CS Docket No. 98-120*

Dear Ms. Salas:

Please find enclosed for filing in the above-referenced proceeding the original and 4 copies of the Reply Comments of Time Warner Cable.

Thank you for your assistance in this matter. If you have any questions, please call me at 202-326-7945.

Very truly yours,



Henk Brands  
*Counsel for Time Warner Cable*

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**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
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OFFICE OF THE SECRETARY**

In the Matter of )

Carriage of Digital Television )  
Broadcast Signals )

Amendments to Part 76 of the )  
Commission's Rules )

CS Docket No. 98-120

**REPLY COMMENTS OF  
TIME WARNER CABLE**

August 16, 2001

Henk Brands  
Scott K. Attaway  
Kellogg, Huber, Hansen,  
Todd & Evans, P.L.L.C.  
1615 M Street, N.W.  
Suite 400  
Washington, D.C. 20036  
(202) 326-7945

## SUMMARY

I. On their third try, broadcasters still fail to provide a coherent explanation why a dual-carriage requirement would make sense as a matter of policy — let alone how such a requirement could withstand First Amendment challenge as a narrowly tailored means to serve an important governmental interest.

Broadcasters do not rely on the traditional *Turner* rationale, which posited that cable carriage is necessary to maintain broadcasters' advertising revenues, thereby preserving access to free-over-the-air television for consumers without cable. This is not surprising: that rationale does not fit the digital context. The analog must-carry requirement already assures continued advertising revenue for broadcasters. And even assuming that the *Turner* rationale correctly assumed that cable operators once had the means profitably to deny carriage of popular broadcasters, ever-increasing competition from DBS and other MVPDs has rendered that assumption untenable. In any event, concern about non-MVPD households' viewing choices cannot credibly justify any digital carriage requirement: the digital transition, which will require non-MVPD households to buy expensive digital equipment, hinders rather than helps access to free-over-the-air television.

Having abandoned the *Turner* rationale, broadcasters now assert that carriage of digital signals is necessary to encourage consumers to buy digital TV sets. But broadcasters currently provide very little HDTV, and carriage of the SDTV they do provide would in no way encourage the purchase of digital TV sets. The evidence establishes that consumers are willing to pay a premium for digital TV sets only if it buys them access to HDTV programming.

This conclusion is compelled not only by the comments in this proceeding, but also by two indisputable facts. *First*, digital TV set manufacturers are now underwriting much of what little HDTV programming is being broadcast. Clearly, these manufacturers — whose job is to know what drives the sale of digital TV sets — have concluded that only HDTV programming will create significant product demand. *Second*, nearly all consumers that have purchased digital TV monitors to date have declined to purchase a digital tuner. Apparently, these consumers have bought their monitor to obtain better resolution for DVD movies, and have concluded that, in the absence of HDTV programming, access to broadcast signals does not merit even a small additional investment.

Broadcasters imply that they will provide HDTV programming once their digital signals are carried on cable, on the premise that advertising revenues will increase sufficiently to cover added costs. But that premise is unsupportable. Advertisers will not pay higher rates simply because their commercials are viewed in HDTV. Accordingly, there is no reason to think that cable carriage will provide any incentive for broadcasters to provide HDTV programming. Rather, broadcasters will provide HDTV programming only when it becomes a competitive necessity — *i.e.*, when the transition has advanced to the point where the installed base of digital TV sets is so large that failure to broadcast in HDTV would impact ratings.

Even if broadcasters did provide HDTV programming, a dual-carriage requirement still would not further the transition in any meaningful way. Broadcasters concede that the most popular stations will be carried even in the absence of must-carry, and carriage of little-watched stations plainly will not encourage consumers to buy digital sets. Moreover, the HDTV movies and sports shown on non-broadcast programming services like HBO and

Showtime will be much more effective in encouraging purchases of digital TV sets than the sitcoms and other fare shown on broadcast television. Moreover, no broadcaster contests that the electronic input-selection switches that are built into digital TV sets make it easy to view digital broadcast signals off-air, which makes cable carriage unnecessary in any event.

If the goal is to encourage consumers to purchase digital TV sets, the much more sensible policy would be simply to require broadcasters to provide HDTV programming. While there is no proof that cable carriage of digital broadcast signals would provide meaningful set-purchasing encouragement, there is abundant proof that additional HDTV broadcast programming would. And while the Commission's authority to require dual carriage is enmeshed in statutory and constitutional questions, there is no doubt that the Commission may lawfully require HDTV broadcasts. Given this readily available and more effective alternative means of encouraging digital-TV-set purchases, imposition of a dual-carriage requirement would not even be rational, much less satisfy intermediate scrutiny under the First Amendment. An HDTV broadcast requirement would also be equitable, in view of broadcasters' largely unfulfilled promises to this Commission to provide HDTV programming voluntarily on the frequencies that they were given for that very purpose.

Even assuming that cable carriage of digital broadcast signals would encourage purchases of digital TV sets, a dual-carriage requirement still could not be justified. Broadcasters assert that encouraging consumers to buy digital TV sets would further two governmental interests, but neither could justify a carriage requirement in the face of a First Amendment challenge. The first interest is the return of analog spectrum, which would then become available for auction. But measures targeting a particular speech medium for the

purpose of generating revenue are subject to automatic invalidation under the First Amendment. Moreover, because the spectrum now to be reclaimed was given away for free, the Commission could not credibly claim that generating auction revenue is sufficiently important to justify abridging protected speech. Indeed, to make cable operators pay for broadcasters' free use of spectrum would imply a content-based judgment that broadcast speech is more valuable than cable speech.

The second interest asserted is that of preserving free-over-the-air broadcasting, which broadcasters say will be endangered by a lengthy transition. Unlike the traditional *Turner* rationale, which posits that cable carriage is necessary to preserve advertising revenue, broadcasters' current claim is that free-over-the-air television may become endangered due to the expense of operating both digital and analog broadcast facilities over an extended period. Broadcasters of course cannot rely on the one-time cost of converting to digital, which would have to be incurred even if the transition occurred overnight. Broadcasters identify only one additional expense item — monthly power bills. Although they nowhere attempt to quantify the size of this burden, available evidence indicates that it is small. And the notion that additional power costs will impose a significant burden on a substantial number of broadcasters is especially implausible given the healthy margins prevalent in the broadcast industry.

Finally, broadcasters are wrong in claiming that dual carriage would impose only a modest burden. In asserting that, because cable capacity is being upgraded, existing programming would not necessarily have to be displaced, broadcasters ignore the innovative and popular services that would otherwise be provided. And digital must-carry would plainly impose a burden much more severe than analog must-carry: while few digital signals are

currently being carried, cable operators already carried the vast majority of analog signals voluntarily.

**II.** A digital must-carry requirement would also effect an unauthorized, uncompensated taking in violation of the Fifth Amendment. Must-carry signals would physically invade the cable plant over which they are required to be transmitted, thus constituting a *per se* taking of private property under long-standing Supreme Court precedent.

**III.** The Commission should also reject broadcasters' attempt to nullify the Commission's unquestionably correct interpretation of "primary video" by giving an unduly broad reading to "program-related." Program-related material outside the primary video transmission of a digital signal is not entitled to carriage at all. And even assuming the Commission is authorized to require carriage of such material, a broad reading would be entirely incompatible with the narrow scope of program-related material in the analog context.

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**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
Carriage of Digital Television	)	
Broadcast Signals	)	CS Docket No. 98-120
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Amendments to Part 76 of the	)	
Commission's Rules	)	

**REPLY COMMENTS OF  
TIME WARNER CABLE**

NAB and certain other broadcasters<sup>1</sup> have returned to the Commission to seek broad carriage rights for digital broadcast signals. But they again fail to formulate any rationale for a dual-carriage requirement that would make sense as a matter of public policy. Thus, a dual-carriage requirement could not withstand scrutiny for reasoned decision-making — much less intermediate First Amendment scrutiny. The Commission should therefore re-affirm its tentative conclusion that a dual-carriage requirement would burden protected speech more than is necessary to promote any governmental interests.<sup>2</sup> The Commission should also reject broadcasters' attempt to undo its interpretation of "primary video" by giving an unduly broad reading to "program-related."

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<sup>1</sup>It is noteworthy that the renewed demands of NAB are not supported by the major broadcast groups, nor by any public-interest groups.

<sup>2</sup>*See Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, ¶¶ 3, 112 (2001) ("Order").

**I. BROADCASTERS HAVE FAILED TO FORMULATE A COHERENT JUSTIFICATION FOR A DUAL-CARRIAGE REQUIREMENT.**

In our opening comments, we explained that, despite two previous opportunities in rulemaking proceedings before this Commission, broadcasters had yet to articulate a coherent rationale as to why a dual-carriage requirement would make sense as a matter of policy — to say nothing of a rationale that could justify such a dual-carriage requirement in the face of a First Amendment challenge. *See* TWC at 4-6. To the extent that they now attempt to formulate such a rationale,<sup>3</sup> broadcasters rely on a single rationale that is different from the traditional *Turner* rationale. According to this new rationale, dual carriage is necessary to encourage consumers to buy digital TV sets, which in turn will both hasten the day by which analog spectrum can be auctioned and protect broadcasters from the burden of a prolonged transition.

As we explain below, this new rationale is untenable. Most broadcasters provide only SDTV programming (and little or no HDTV programming). Carriage of SDTV programming would do nothing to accelerate the sale of digital TV sets. Even if broadcasters did provide HDTV signals, there is no proof that sales of digital TV sets would proceed faster in a world with a dual-carriage requirement than in a world without one. Besides, the ultimate governmental interests on which the broadcasters rely cannot support a dual-carriage requirement. The asserted governmental interest in generating revenue by freeing spectrum for auction is simply not sufficient; long-standing Supreme Court precedent establishes that the

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<sup>3</sup>The Public Broadcasters unveil an elaborate must-carry wish list dubbed “the Working Draft,” Public Broadcasters at 24, but the Public Broadcasters do not elaborate on the rationale that they apparently believe would justify imposing a dual-carriage requirement.

interest in generating revenue cannot support a media-targeted burden. And the asserted interest in rescuing broadcasters from a prolonged transition rests on the mistaken factual premise that a lengthy transition will impose significant costs above and beyond those of a short transition. Regardless, any putative benefits of a dual-carriage requirement would be outweighed by harm to cable operators, non-broadcast programming services, and consumers.

**A. Broadcasters Have Abandoned the Traditional *Turner* Rationale.**

Broadcasters do not rely on the traditional *Turner* rationale. That rationale posited that consumers often disconnect their antenna after subscribing to cable, and that cable subscribers therefore will not watch broadcast signals that are not carried on cable. *See* TWC at 8. Thus, the rationale continued, broadcast signals not carried on cable would see a good part of their audience disappear and would suffer a serious loss of advertising revenue. *See id.* Moreover, the theory ran, cable operators — unrestrained by competition from other MVPDs — had a financial incentive to replace broadcast signals with non-broadcast programming services on which they could sell advertising “avails.” *See id.* at 8-9. Broadcast stations dropped from cable as a result might be weakened or go out of business, the theory concluded, leaving the 40 percent of Americans without cable with fewer or less well-financed broadcast signals to watch. *See id.*

That broadcasters do not rely on *Turner*’s “audience diversion” theory is not surprising: it simply does not fit with the digital context. *See id.* at 9-13. For one thing, the analog must-carry requirement remains in effect. With that requirement in place, stations are assured continued advertising revenue. *See id.* at 10-11. For another thing, even assuming that the *Turner* rationale’s premise — that cable operators can drop popular broadcasters with

impunity — ever rang true, it has now collapsed in light of ever-increasing competition from DBS and other MVPDs. *See id.* at 9-10.<sup>4</sup> Finally, any concern with the number of broadcast signals available to consumers without cable is misplaced: the whole point of the digital transition is to compel consumers without cable to buy expensive equipment or be stranded without broadcast signals altogether. *See id.* at 10-11.<sup>5</sup>

**B. Broadcasters' "Encourage the Purchase of Digital TV Sets" Rationale Cannot Justify any Carriage Requirement.**

Instead of relying on a *Turner*-based rationale, broadcasters rely on a new rationale that posits that cable carriage is necessary to coax consumers into purchasing digital TV sets. If digital broadcast signals are carried on cable, broadcasters say, consumers will have a stronger incentive to buy a digital TV set. With a larger audience, they contend, broadcasters will have a stronger incentive to provide more appealing digital content — thereby giving consumers an

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<sup>4</sup>This is particularly true because cable operators earn three times as much revenue from subscriptions than they earn from advertising. *See* NCTA, *Industry Statistics* (in 2000, cable operators earned \$40 billion in subscriptions versus \$13 billion in advertising), *at* [http://www.ncta.com/industry\\_overview/indStat.cfm?indOverviewID=2](http://www.ncta.com/industry_overview/indStat.cfm?indOverviewID=2). This makes dropping popular broadcast programming to garner a slim gain in advertising revenue a particularly risky strategy.

<sup>5</sup>Even more fundamentally, it is questionable that a concern with free-over-the-air broadcasting can still supply a credible justification for any carriage requirement. As Chairman Powell recently acknowledged, the interest in protecting “the 40 percent of Americans without cable” would obviously lose its factual predicate if 100 percent of American television households subscribed to an MVPD. *See Powell Questions Future Role of Over-the-Air TV*, *Communications Daily*, Apr. 6, 2001, at 1. The point of full MVPD viewership is now rapidly approaching. Only 16.25 percent of television households do not subscribe to an MVPD. *See Annual Assessment of the Status of Competition in the Market for the delivery of Video programming*, Seventh Annual Report, CS Docket No. 00-132, FCC 01-01, 2001 WL 12938, Table C-1 (rel. Jan. 8, 2001). That is only slightly more than the 15 percent of households that Congress is apparently prepared to deprive of free-over-the-air television altogether. *See* 47 U.S.C. § 309(j)(14)(B)(iii).

even stronger incentive to buy digital TV sets, and so on. In this theory, encouraging consumers to buy digital TV sets kills two birds with one stone: it hastens the day by which analog spectrum can be returned (which can then be auctioned to generate revenue), and it ameliorates the burden placed on broadcasters by an extended transition (thereby serving the interest of protecting free-over-the-air TV).

**1. Only HDTV Programming Could Encourage Consumers To Purchase Digital TV Sets.**

The premise of the broadcasters' argument appears to be that cable carriage of just *any* digital broadcast signals will significantly encourage consumers to purchase digital TV sets. That premise is mistaken. The available evidence does establish that a growing number of consumers is willing to pay a premium for a digital TV set. *See infra*, p.16 n.27 But it also establishes that consumers are willing to do so only if it buys them something that they cannot already get without paying that premium: HDTV.<sup>6</sup> Thus, only increasing the supply of HDTV programming could stimulate the sale of digital TV sets. Yet, to date, broadcasters have provided very little HDTV programming.<sup>7</sup> Carriage of the SDTV fare that they do provide

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<sup>6</sup>As NAB itself has elsewhere acknowledged, "improved picture quality [is] the most important attribute in determining willingness to pay for new-generation DTV sets." Marcia L. DeSonne, NAB Research and Planning, *HDTVs, It's Where the Buyers Are* (1998) (internal quotation marks omitted).

<sup>7</sup>*See* HBO at 7 ("HBO provides more HDTV programming in any given week than all the broadcast networks combined, with Showtime carrying almost as much"); NCTA at 10-11 ("other than CBS's prime time schedule, hardly any HDTV programming is being broadcast"); Consumer Electronics Ass'n ("CEA") at 7 n.12 (recent survey "found that only 3.6%, or approximately 1,008 hours per year, are broadcast in high-definition"); Roy Stewart, Chief, Mass Media Bureau, *Digital Television Transition: Presentation to the FCC*, Apr. 19, 2001, at 7 ("Currently, broadcasters are providing only a limited amount of digital content that takes advantage of the technology's capabilities."), at <http://www.fcc.gov/DTV>; *Review of the*

would do nothing to encourage consumers to purchase digital TV sets.<sup>8</sup> Thus, requiring such carriage would therefore unquestionably violate the First Amendment.<sup>9</sup>

That carriage of SDTV programming would do nothing to encourage the purchase of digital TV sets finds strong support not only in the comments,<sup>10</sup> but also in two record facts.

*First*, as broadcasters concede, much of the HDTV programming now available on broadcast stations is being subsidized by TV-set manufacturers and retailers.<sup>11</sup> Plainly, these firms —

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*Commission's Rules and Policies Affecting the Conversion to Digital Television*, Comments of the Consumer Electronics Association, MM Docket No. 00-39, at 14 (FCC filed Apr. 6, 2001) ("The broadcast networks, with notable exceptions such as CBS and public broadcasting, are not currently providing sufficient digital programming to draw viewers to broadcast DTV. At present, HBO, Showtime and MSG cable networks are offering more HDTV than all of the broadcast networks combined."). Despite the Commission's specific request that broadcasters report how much HDTV programming is currently being broadcast, *see Order* ¶ 120, no broadcaster has provided that information in the opening-comment round.

<sup>8</sup>*See, e.g.*, Andrew Bowser, *The DTV Waiting Game*, Broadcasting & Cable, Sept. 4, 2000 ("If [broadcasters] are simply upconverting analog, my response is, don't bother, it doesn't matter," says Consumer Electronics Association President Gary Shapiro. "I mean, seeing Rosie [O'Donnell's] face upconverted — give me a break.").

<sup>9</sup>*Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404, 2427 (2001) ("A regulation cannot be sustained if it provides only ineffective or remote support for the government's purpose, or if there is little chance that the restriction will advance the State's goal.") (internal quotation marks and citations omitted).

<sup>10</sup>*See, e.g.*, CEA at 7 ("Undoubtedly, a major impediment to the DTV transition is the lack of original digital programming, especially high-definition programming."); *id.* at 8 ("high definition broadcasting, given its superior quality and definition, will spur consumer interest in DTV"); C-Span at 3 ("The real incentive for consumers to invest in digital television will be compelling digital-only or high definition programming that they can not get any other way.").

<sup>11</sup>*See, e.g.*, *Samsung, Sears and DirecTV Seek HDTV Jump-Start*, Communications Daily, Aug. 3, 2001, at 2 (Samsung, Sears, Mitsubishi, and Thomson have underwritten HDTV sports programming on CBS); Joseph S. Kraemer & Richard O. Levine, NAB, *Implications of the Adoption of Digital Must-Carry on the Speed of the Broadcast DTV Transition: A Scenario Analysis* 36 (June 11, 2001) (App. A to NAB Comments) ("Kraemer

who earn a living from knowing what drives the purchase of digital TV sets — have concluded that increasing the supply of HDTV programming is the only effective way to encourage the purchase of digital TV sets. And that is more than idle speculation: these firms have backed their predictions with hard-earned cash.

*Second*, of the digital TV sets sold to date, only a miniscule fraction was sold *with a digital tuner*. The vast majority of these sets consists of *monitors* purchased by consumers who for now use them only to view DVDs.<sup>12</sup> Consumers are declining to purchase digital tuners even though tuners can already be put to good use with an antenna and, increasingly, with cable; even though they have paid \$3,000 or more for the monitor; and even though a tuner costs only about \$500 extra.<sup>13</sup> Thus, consumers buying digital sets have apparently concluded that, given the absence of HDTV programming on broadcast television, the small additional investment in a tuner is a waste of money.<sup>14</sup> If SDTV programming does not

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*Report*”) (“much of today’s high definition programming is supported by set manufacturers, not broadcasters”).

<sup>12</sup>See, e.g., NCTA at 11 (only 27,000 of 625,000 digital sets were sold with tuners); Michael Grotticelli, *Something to Watch*, Broadcasting & Cable, May 7, 2001, at 48 (“of the 648,000 sets sold since DTV inception three years ago, only 27,000 have tuners in them”); Don West, *Digital Box to the Rescue*, Broadcasting & Cable, Apr. 23, 2001, at 100 (“At last count, fewer than a million sets had been sold, only a handful with tuners that would make them more than monitors for DVD.”); *Kraemer Report* at 36 (“15 DTV decoders are currently being sold for every 100 DTV-capable sets”).

<sup>13</sup>See *Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, Comments of the Consumer Electronics Association, MM Docket No. 00-39, at 9 (FCC filed Apr. 6, 2001).

<sup>14</sup>See, e.g., Statement by David Garland, Director of Gov’t & Public Relations, Thomson Multimedia, *Hearing Before the House Committee on Energy and Commerce, Subcommittee on Telecommunications and the Internet* (Mar. 15, 2001) (“The question that should be asked by broadcasters is, ‘why is consumer demand for digital-ready displays

encourage tuner purchases by consumers who have already invested in a digital monitor, it certainly will not encourage purchases by consumers who are new to digital TV.

That carriage of SDTV programming cannot encourage the purchasing of digital equipment is also a matter of common sense. Even if displayed on a digital TV monitor, SDTV broadcast programming does not deliver a perceptibly better picture than the same programming on an upscale analog TV set through a digital cable set-top box.<sup>15</sup> And, although SDTV broadcast programming may give consumers additional channels and better sound, they

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disproportionately greater than it is for DTV receivers or far less expensive DTV converter boxes?’ The answer is simple: readily available content. Consumers purchasing HDTV monitors know that when they bring their monitor home they can immediately begin to enjoy the display’s higher quality picture through *abundant* amounts of programming available on DVD. In fact, it does not take a great leap of logic to predict that consumers who are willing to purchase a high-end digital display just to enjoy the *better* picture quality afforded by DVDs, will be the same consumers who will seek to add a DTV tuner device to their display device to receive the best picture quality once greater amounts of HDTV are available.”), *at* <http://www.house.gov/commerce/hearings/03152001-108/Arland138.htm>; Statement for the Record by Richard M. Lewis, Sr. Vice President, Research & Technology, Zenith Electronics Corp., at 5-6, *Hearing on the Transition to Digital Television Before the Senate Committee on Commerce, Science and Transportation*, 107th Cong. (Mar. 1, 2001) (“Today’s consumers are very sophisticated and will not pay extra for items requiring content that is not available. Increased HDTV broadcast programming or other digital content will give them the reason to spend the extra money for a tuner or integrated set.”), *at* <http://www.senate.gov/~commerce/issues/telco.htm#Hearings>.

<sup>15</sup>*See, e.g.,* Dawn C. Chmielewski, *HDTV Installation Can Be a Real Turnoff*, *Personal Technology*, *Seattle Times*, May 13, 2001 (“The subtle differences in clarity and color sharpness were noticeable only when I switched between digital channels and cable television to point out the contrast.”), *at* <http://archives.seattletimes.nwsource.com/cgi-bin/taxis/web/vortex/display?slug=pthdtv13&date=20010513>; *id.* (“[O]ut of 40 transmitting digital signals from Mount Wilson north of Los Angeles . . . [o]nly one — the PBS affiliate, KCET — broadcast programming in the hyper-lush, see-the-dew-on-the-rose-petals HDTV. The rest looked like anything you’d see with a satellite dish.”); Andrew Bowser, *The DTV Waiting Game*, *Broadcasting & Cable*, Sept. 4, 2000 (“upconverted programming sometimes looks worse than plain old NTSC”).



can already buy those things for a much smaller price by subscribing to digital cable or DBS. Thus, the notion that cable carriage of SDTV programming will cause consumers to run to Circuit City to buy a digital TV set is implausible. Other than unsupported assertions, broadcasters cite no evidence for it.<sup>16</sup>

**2. The Prediction That Broadcasters Will Provide HDTV Programming After Securing Cable Carriage Is Unfounded.**

Broadcasters hint that, although they may not have provided much HDTV programming to date, they *will* provide HDTV programming if only they are first given cable carriage. Once they secure access to a cable audience, broadcasters imply, advertisers will be willing to pay them the revenue they need to create HDTV programming.

But that simply does not follow. There is a good reason why broadcasters have provided little HDTV to date — and it has nothing to do with cable carriage. For broadcasters, HDTV holds out financial loss. HDTV unquestionably entails additional investments — including new antenna towers, transmission facilities, and, ultimately, production equipment. But HDTV brings no new revenue. Broadcasters earn revenue by selling advertising. Advertisers pay broadcasters according to the size of the audience they can

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<sup>16</sup>*See, e.g., Kraemer Report* at 27 (saying without support that “multiplexed digital signals . . . are likely to provide the greatest potential attraction to potential DTV purchasers”).

deliver.<sup>17</sup> Advertisers do not pay higher rates if the audience views commercials in HDTV.<sup>18</sup>

Thus, HDTV is much like color TV: broadcasters have no incentive to initiate the transition to the new broadcasting technology, and will provide HDTV programming only when the installed base of digital TV sets is so large that it begins to impact Nielsen ratings — *i.e.*, when HDTV becomes a competitive necessity.<sup>19</sup>

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<sup>17</sup>See, *e.g.*, Bruce M. Owen & Steven S. Wildman, *Video Economics* 3 (1992) (“The price of the product is quoted in dollars per thousand viewers per unit of commercial time.”); NAB at 17 (“The economics of programming are driven by the size of the potential audience.”)

<sup>18</sup>See, *e.g.*, Michael Grotticelli, *Whither iBlast?*, *Broadcasting & Cable*, May 7, 2001 (quoting broadcast executive as saying that “advertisers are not going to pay us any more money to run their commercials in high definition than they will in standard definition”); Andrew Bowser, *The DTV Waiting Game*, *Broadcasting & Cable*, Sept. 4, 2000 (quoting broadcast analyst as saying that “DTV offers no additional revenue in the near term, certainly HD has none”); Jane Black & Olga Kharif, *A Way Out of the HDTV Mess*, *BusinessWeek Online*, Mar. 1, 2001 (“Broadcasters earn money from advertisers, which pay according to the number of viewers, not according to whether the signal is being displayed on a 5-inch black-and-white or a 65-inch gas-plasma screen.”), at [http://www.businessweek.com/bwdaily/dnflash/mar2001/nf2001031\\_278.htm](http://www.businessweek.com/bwdaily/dnflash/mar2001/nf2001031_278.htm); Denise Culver, *Few Consumers Want Their HDTV*, *zdnet Inter@ctive Week*, May 22, 2000 (“advertisers . . . simply aren’t willing to pay a higher price for consumers to see a clearer version of their ads”), at <http://www.zdnet.com/intweek/stories/news/0,4164,2574616,00.html>; Megan Larson, *The High Cost of High Def.*, *MediaWeek*, Apr. 17, 2000 (2000 WL 22629144) (“‘There is no money in it,’ one small-market station group owner said of HDTV.”); Thomas W. Hazlett, *An Essay on Airwave Allocation Policy* 12 (Harvard J. L. & Tech., Working Paper 01-02, Jan. 2001) (“[s]tatistics did not perceive consumer demand for high resolution pictures that would justify the cost of providing them”), at [http://www.aei.brookings.org/publications/working/working\\_01\\_02.pdf](http://www.aei.brookings.org/publications/working/working_01_02.pdf).

<sup>19</sup>In the early years of color television, broadcasters provided no color programming, which they viewed as adding cost without adding revenue. See generally *Kraemer Report* 13-14. The exception was NBC, which was vertically integrated with RCA, and which had an interest in the transition to color not as a broadcaster but as a manufacturer of color sets. See *id.* The other networks did not follow suit until the efforts of NBC/RCA had increased the installed base of color sets to the point that it began to have an impact on ratings: viewers with color sets obviously preferred NBC’s color programming. See *id.* at 14.

Broadcasters never explain how their incentives would suddenly change if they were carried on cable.<sup>20</sup> Even if HDTV broadcast signals *were* carried on cable, those signals still could be viewed only by cable subscribers with digital TV sets. And advertisers pay broadcasters for delivering consumers who actually view advertisements — not for delivering consumers who might view their advertisements if only they had a digital TV set. Thus, cable carriage still would not give broadcasters an incentive to provide HDTV programming — just as, in the pre-cable 1960s, the massive installed base of antennas capable of receiving color programming did nothing to convince broadcasters to provide color TV programming.

Indeed, read carefully, broadcasters' comments do not promise that they will provide HDTV programming once their digital signals are carried on cable. Instead, broadcasters promise only undefined "advanced digital programming." *See, e.g.*, NAB at 12 ("Without a potential mass-market audience for OTA DTV, programmers have a reduced incentive to develop, and the networks to invest in, the *advanced digital programming* that will attract DTV set purchases") (emphasis added); *Kraemer Report* at 12 ("Without a potential mass-market audience for free-to-air digital television, programmers will have a reduced incentive to develop, and the networks to invest in, *the advanced digital programming* that will attract DTV set purchasers.") (emphasis added).

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<sup>20</sup>*See, e.g.*, Kraemer at 36-37 (stating this without support). Broadcasters rely on a report of the Congressional Budget Office, *see, e.g.*, NAB at 23 n.57 (citing Congressional Budget Office, Completing the Transition to Digital Television at x (Sept. 1999) ("*CBO Report*")), but that report does not actually say that cable carriage will encourage digital TV set purchases — only that carriage will increase the number of consumers satisfying the test of 47 U.S.C. § 309(j)(14)(B)(iii)(I).

Given their financial incentives, there is every reason to believe that the broadcasters' careful choice of words reflects an attempt to secure must-carry rights for *SDTV multicasts*. Whereas HDTV cannot increase a broadcasters' audience (and advertising revenue), multicasting can.<sup>21</sup> Moreover, whereas cable subscribers can view carried HDTV programming only if they have both a digital TV set and a special HDTV cable box, cable subscribers can view carried SDTV broadcast signals with an existing analog TV set and a "regular" digital cable box (the kind that cable subscribers rent or buy when they subscribe to "digital cable").<sup>22</sup> Thus, if carried, SDTV broadcast signals would immediately expand broadcasters' audience by exposing them to the almost 20 percent of cable subscribers who have "digital cable."

Although compelled carriage of SDTV multicast signals would thus benefit broadcasters, it would do nothing for the transition: carriage of such signals would in no way

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<sup>21</sup>As Bud Paxson recently put it bluntly: "We're not under any obligation to provide HDTV. . . . It's what a lot of members of Congress thought we were going to do. However plans change, things evolve. . . . With HDTV, we have one network. With multicasting, we can have five, . . . and possibly make money." Jane Black & Olga Khariff, *A Way Out of the HDTV Mess*, BusinessWeek Online, at [http://www.businessweek.com/bwdaily/dnflash/mar2001/nf2001031\\_278.htm](http://www.businessweek.com/bwdaily/dnflash/mar2001/nf2001031_278.htm) (internal quotation marks omitted).

<sup>22</sup>*See Paxson Chicago License, Inc. v. 21st Century TV Cable, Inc.*, Docket No. CSR 5593, FCC 01-226 (rel. Aug. 15, 2001) ("Paxson requested that the Commission order each of the cable operators involved to replace the existing WCPX analog service with a downconverted analog version of the digital primary Central Time feed of PAXTV received from channel 46 *and place the remaining five channel 46 programming streams on the digital portion of the cable systems for access by subscribers that have digital set-top boxes.*") (emphasis added); *see also* TWC's Responses to Questions on Cable System Capacity and Retransmission-Consent Agreements at 3 (FCC filed May 25, 2001) (whereas HDTV broadcast programming requires a special set-top cable box, SDTV broadcast programming can be viewed with "regular" digital cable box).

encourage consumers to buy digital TV sets. In fact, compelled carriage of SDTV multicast signals might *retard* the transition. Compelled carriage of SDTV multicast signals would come at the expense of non-broadcast signals, including HDTV non-broadcast signals (*e.g.*, the HDTV feeds of HBO and Showtime). Moreover, compelled carriage of SDTV multicast signals would leave broadcasters without any incentive to provide the HDTV programming that might result in voluntary carriage.

**3. Even a Requirement To Carry Only HDTV Signals Could Not Be Justified on the Basis of a Set-Purchase-Encouraging Rationale.**

Even a requirement to carry only broadcast signals used for HDTV purposes would make little sense. There is no proof that consumers would be significantly more likely to purchase digital TV sets with such a rule than without it. That is so for at least four reasons.

*First*, as broadcasters concede, popular broadcasters' digital signals will be carried regardless of what the Commission decides in this docket.<sup>23</sup> Thus, the main beneficiaries of must-carry rights would be less popular stations. Even if those stations would provide HDTV programming, the notion that carriage of little-watched stations would appreciably spur purchases of digital TV sets is far-fetched. Broadcasters' comments have no answer other than to fall back on the traditional *Turner* rationale: they protest that, once some digital signals are

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<sup>23</sup>See NAB at 20 ("As DTV, over time, becomes desirable to more viewers, a cable operator might carry the most popular commercial DTV broadcasters. But there is little incentive for cable to carry other DTV broadcasters."); *Kraemer Report* at 32 ("a cable operator . . . might carry the most popular two or three commercial broadcast channels plus a digital non-commercial channel"); David Gunzerath, NAB, *Survey of DTV Cable Carriage Issues* 4 (June 11, 2001) (App. B to NAB Comments) ("*NAB Survey*") ("network affiliates are more likely than other stations to represent desirable additions to a cable system's channel lineup").

carried, non-carriage might result in *Turner*-like injury because consumers might no longer be willing to watch analog signals. See, e.g., *Kraemer Report* at 31-32. The short answer to that contention is that, if and when penetration of digital TV sets is so great that consumers are no longer willing to watch analog signals, the transition will likely be complete.

*Second*, the premise that carriage of digital broadcast signals is necessary to encourage the purchasing of digital TV sets assumes that carriage of other digital signals would not do the job. There is no evidence supporting that proposition. Whereas broadcasters (with their advertiser-supported business model) will provide only programming that appeals to a wide audience, MVPDs (whose business model is largely subscription-based) will provide programming appealing to even small niche audiences. This explains why the HDTV feeds of HBO, Showtime, and other non-broadcast programming services are now rapidly gaining carriage. Moreover, the movies shown on those services will be much more effective in encouraging digital TV set purchases than the sitcoms and other fare of broadcasters.<sup>24</sup> Indeed, the president of CEA has suggested that carriage of non-broadcast HDTV programming renders carriage of digital broadcast signals altogether unnecessary.<sup>25</sup>

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<sup>24</sup>See, e.g., *FCC's Pepper Says Quick DTV Transition is Critical to Broadcaster Survival*, *Communications Daily*, July 25, 2001, at 3 (quoting FCC Plans & Policy Chief Robert Pepper as saying that "people are buying digital TV sets for movies"); Bill McConnell & Paige Albinak, *Desperately Seeking HDTV*, *Broadcasting & Cable*, July 22, 2001, at 38 ("CBS is one of the leaders in providing high-definition digital programming, but critics say a heavy dose of shows like *Everybody Loves Raymond* is not the type of programming to drive DTV viewership.").

<sup>25</sup>*Broadcasters Fear Difficulties Meeting 2002 DTV Deadline*, *Communications Daily*, Apr. 24, 2001, at 6 (quoting CEA President Gary Shapiro as saying that "[e]ven must-carry isn't mandatory . . . because of DTV being delivered by DBS").

*Third*, MVPD carriage of digital broadcast signals could hasten the purchasing of digital TV sets only if consumers perceive antennas and input-selection switches as significant obstacles to the reception of digital broadcast signals. As Time Warner Cable previously explained, however, digital TV sets come with built-in electronic, remote-controlled input-selection switches that make it easy for cable subscribers to receive digital signals off-air. *See* TWC at 12-13. No broadcaster has contested the efficacy of these switches. Although broadcasters nevertheless suggest that consumers will not rely on input-selection switches, the only evidence to which they point relates to older, mechanical, A/B switches. *See Kraemer Report* at 32-33; Univision at 8.

Broadcasters also suggest that, because some DBS subscribers are willing to pay \$5-\$6 per month for a package of local broadcast channels rather than install an antenna to receive those channels for free, cable subscribers will not likely install antennas to receive digital broadcast signals. *See Kraemer Report* at 34. But it is unclear how some DBS subscribers' judgment that not having to erect an antenna is worth a small monthly fee proves that DBS or cable subscribers would not erect an antenna if that were the only way to receive digital broadcast signals. The pre-SH VIA state of affairs proves that they would: before that enactment, the vast majority of DBS subscribers believed that using an antenna and input-selection switch was a small price to pay. Indeed, in the context of the debate preceding the adoption of SH VIA, broadcasters themselves portrayed antennas as perfectly effective alternatives to DBS carriage.<sup>26</sup>

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<sup>26</sup>*See* NAB Press Release, *NAB Calls on Satellite Industry to Supply Antennas*, Feb. 22, 1999, at <http://www.nab.org/newsroom/pressrel/releases/0899.asp>; *see generally* Ex Parte

*Finally*, the basic premise of the broadcasters' "let's encourage the purchasing of digital TV sets" rationale is that government intervention is needed to that end. But, in light of recent marketplace developments, it is questionable that this is so. Shipments of digital TV sets have increased dramatically in recent months: almost a quarter of all TV-set-sales revenue (versus 10% a year ago) is now earned on digital TV sets.<sup>27</sup> The introduction of digital TV sets is now occurring at a faster clip than the introduction of any other consumer product at a comparable stage.<sup>28</sup> Thus, it appears that the transition is on the cusp of becoming self-sustaining, if it has not already. Surely, it would make no sense to impose onerous burdens

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Letter from Arthur H. Harding to Magalie Roman Salas, CS Docket No. 98-120 (FCC filed Apr. 28, 1999).

<sup>27</sup>"DTV shipments to dealers accounted for 22.7% of total TV sets shipped in June, compared with 9.6% in same month year earlier, CEA reported. DTV shipments rose 89.7% in June to 159,463 from 85,057 in June 2000 at same time as total TV shipments declined 19.8% to 701,642 from 874,605. For 6 months, DTV shipments were up 105.1% to 868,758 from 423,586 as total TV shipments fell 6.7%. DTV sets accounted for 22% of all sets shipped in first 6 months of 2001, vs. 10% in Jan.-June 2000." *Communications Daily*, Aug. 9, 2001, at 8; *see also* *Communications Daily*, July 18, 2001, at 10 ("Suppliers shipped 227,349 DTV sets to dealers in 2nd quarter, up 166.7% from 85,241 in same 200 quarter, CEA said."); Michael Grotticelli, *Something to Watch*, *Broadcasting & Cable*, May 7, 2001, at 48 (reporting that sales in 1Q01 increased 158 percent over 1Q00); Monica Hogan, *DTV Sales to Soar, CEA Predicts*, *Multichannel News*, June 18, 2001 ("Sales from manufacturers to dealers were up 193 percent in May over last year's numbers."), at [www.tvinsite.com/multichannelnews/index-asp?layout=toc&update=6/18/01](http://www.tvinsite.com/multichannelnews/index-asp?layout=toc&update=6/18/01).

<sup>28</sup>*See Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Comments of the Consumer Electronics Association, MM Docket No. 00-39, at 5 (FCC filed Apr. 6, 2001) ("Annual growth in both unit and dollar sales for DTV products during the first four years on the market is projected to surpass that of computers, VCRs, CD players, and color TVs."); *FCC Tells Broadcasters and Cable to Work Together on DTV*, *Communications Daily*, June 22, 2001, at 4 (quoting FCC officials Susan Eid and Roy Stewart as saying that conversion process is "pretty much on target" when compared to "slow early take rate for VCRs").



aimed at encouraging digital TV set purchases after the transition has already taken off on its own steam.

**4. The Commission Could Not Lawfully Rely on any Carriage Requirement To Encourage the Purchase of Digital TV Sets Without First Requiring Broadcasters to Provide HDTV.**

If the goal is to encourage consumers to buy digital TV sets, a much more sensible way of accomplishing that goal would be to *require* broadcasters to provide HDTV programming. While there is no proof that cable carriage of digital broadcast signals would encourage consumers to buy digital TV sets, there *is* proof that additional HDTV broadcast programming will do so. *See supra*, pp. 5-9. Moreover, whereas digital must-carry is surrounded by statutory and constitutional questions, there is no doubt (and broadcasters have never denied) that the Commission has statutory authority to impose an HDTV-broadcasting requirement.<sup>29</sup>

In addition, there is considerable equity in requiring broadcasters to provide HDTV. Broadcasters secured digital spectrum on the strength of their promise to provide HDTV.<sup>30</sup>

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<sup>29</sup>*See* 47 U.S.C. § 336(b)(2) (stating that Commission must “limit the broadcasting of ancillary or supplementary services on designated frequencies so as to avoid derogation of any advanced television services, including *high definition television broadcasts, that the Commission may require using such frequencies*”) (emphasis added); *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd 12809, ¶ 41 (1997) (“*Fifth Report*”) (“The 1996 Act specifically affords the Commission discretion whether or not to require minimum high resolution television programming.”) (citing 47 U.S.C. § 336(b)(2)).

<sup>30</sup>*See, e.g.*, Testimony by Thomas W. Hazlett ¶ 5, *Hearing on the Transition to Digital Television Before the Senate Committee on Commerce, Science and Transportation*, 107th Cong. (Mar. 1, 2001), at <http://www.senate.gov/~commerce/issues/telco.htm#Hearings>; Joel Brinkley, *Defining Vision: How Broadcasters Lured the Government into Inciting a Revolution in Television* 7-12, 19-31 (1998). As these same sources establish, broadcasters’ interest in HDTV may have been mainly as a plausible use for spectrum that had been allocated for broadcast purposes but that the Commission was threatening to re-assign to so-called “land

Moreover, in 1997, broadcasters urged the Commission not to impose an HDTV requirement by promising that they would provide HDTV voluntarily.<sup>31</sup> The Commission declined to require HDTV broadcasts in reliance on that promise: noting that broadcasters had “emphasized their commitment to high definition television,” the Commission saw “nothing in the record that identifies a market failure or other reason to impose a governmental requirement for high definition television.” *Id.* ¶ 44 (footnote omitted).

Such a market failure has now surfaced: broadcasters will not voluntarily provide HDTV programming because advertisers do not pay more for HDTV. *See supra*, pp. 9-10. Thus, if the Commission believes that the rate of digital TV set purchases is in need of acceleration, the Commission should revisit its conclusion not to require broadcasters to provide HDTV programming on the frequencies that they received for that very purpose. Indeed, the Commission *must* do so before attempting to encourage the purchasing of digital TV sets by imposing a dual-carriage requirement. Imposing a digital must-carry requirement would not survive review for reasoned decision-making (much less intermediate First Amendment scrutiny) where an alternative measure is available that is more effective in

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mobile” use.

<sup>31</sup>*See, e.g., Fifth Report* ¶ 38 (“ALTV states that a minimum HDTV requirement would be burdensome, and, moreover, superfluous because the broadcast industry has maintained its commitment to implement HDTV.”); *id.* (“AAPTS and PBS, in joint comments, oppose a minimum HDTV requirement, noting that the Commission can rely on broadcasters and public television’s commitment to HDTV”).

solving the putative problem, that is not the subject of any questions concerning the Commission's authority, and that imposes no burden on protected speech.<sup>32</sup>

**C. The Interests That Broadcasters Say Would Be Served by Encouraging the Purchase of Digital TV Sets Cannot Justify any Carriage Requirement.**

In the Broadcasters' reasoning, encouraging the purchasing of digital TV sets is not an end in itself but is needed to promote two governmental interests: (1) clearing analog spectrum, which then becomes available for auction and for telecommunications uses; and (2) preserving free-over-the-air broadcasting, which might be endangered by the burdens of a lengthy transition. *See* NAB at 28; Univision at 19. Even assuming that cable carriage of digital broadcast signals would be an effective way of encouraging consumers to purchase digital TV sets, a dual-carriage mandate still could not be justified on either of these grounds.

1. As to the interest in clearing spectrum and garnering auction revenue, we can be brief. Government may no more commandeer cable channels for the purpose of generating revenue than it may seize newspaper pages for that purpose. A dual-carriage regime aimed at generating auction revenue would be no different from a measure confiscating one page of each day's New York Times to pocket advertising revenue. Any such revenue-raising measure

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<sup>32</sup>*See, e.g., Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490-91 (1995) ("The FAAA's defects are further highlighted by the availability of alternatives that would prove less intrusive to the First Amendment's protections for commercial speech."); *City of Cincinnati v. Discovery Network, Inc.*, 501 U.S. 410, 417 n.13 (1993) ("if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable"); *Allied Local and Regional Mfrs. Caucus v. EPA*, 215 F.3d 61, 80 (D.C. Cir. 2000) ("To be regarded as rational, an agency must also consider significant alternatives to the course it ultimately chooses.").

targeted at a speech medium poses a risk to free speech so serious as to trigger automatic invalidation.<sup>33</sup>

Besides, if the object were to raise revenue, that goal could have been accomplished by auctioning the spectrum given to broadcasters in 1996. Now that the spectrum has been given away for free, the Commission cannot credibly claim that generating auction revenue is so important as to justify abridging protected speech. *See* TWC at 16; *cf. United States v. Oakland Cannabis Buyers' Cooperative*, 121 S. Ct. 1711, 1723 (2001) (Stevens, J., concurring in the judgment) (necessity defense not available to those who “have thrust [choice between two evils] upon themselves”); *Turner Broadcasting v. FCC*, 910 F. Supp. 734, 774 n.19 (D.D.C. 1995) (Williams, J., dissenting) (“Congress cannot invoke a problem created by [Congress itself] as a justification for the remedy.”). Any such claim would imply the content-based judgment that, whereas broadcast speech is too important to be made to pay for the spectrum it uses, cable speech is of such low value that it can be made to pay for others’ use of spectrum.<sup>34</sup>

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<sup>33</sup>*See Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 586 (1983) (“Standing alone, . . . [the interest in raising revenue] cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally, avoiding the censorial threat implicit in a tax that singles out the press.”) (footnote omitted); *see also Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 198, 231-32 (1987) (same).

<sup>34</sup>For the same reason, broadcasters gain nothing from their argument that newly auctioned spectrum can be used for new telecommunications services. *See* NAB at 28. If the objective is to provide spectrum for new telecommunications services, the digital spectrum granted to broadcasters could have been sold to providers of telecommunications services directly. And it would be no answer to say that this would have left no spectrum to facilitate the transition to digital broadcasting. Broadcasters do not claim that the transition to digital

2. As for the interest in preserving free-over-the-air broadcasting, broadcasters are not relying on the traditional *Turner* rationale, which posits that cable carriage is necessary to preserve advertising revenue. *See supra*, p.3. Instead, they assert that carriage is necessary to limit the financial burden that might result from a lengthy transition, which, they argue, will require broadcasters to operate analog and digital transmission facilities side-by-side. The theory is that, because operating dual transmission facilities imposes an ongoing expense, a lengthy transition will cause broadcasters financial distress.<sup>35</sup>

To support this theory, broadcasters cannot rely on the one-time conversion costs of the transition. For example, they cannot rely on the costs of erecting new antennas, which they say can amount to \$1 million per station.<sup>36</sup> Those costs will be incurred whether the transition lasts one second or one century; it cannot be diminished by shortening the transition. Instead,

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broadcasting is an important governmental interest in itself, and they plainly could not. Bringing upscale consumers high-resolution television images simply is not sufficiently important to warrant the burdening of constitutionally protected speech. *See TWC* at 13-14.

<sup>35</sup>*See, e.g.*, Public Broadcasters at 21 (“broadcasters will be forced to sustain the operation of two facilities at considerable ongoing expense, without any additional revenue, and with inevitably impaired service”); NAB at 6-7 (“the vitality of free over the air broadcasting system will be diminished, for some stations to the point of marginal existence or extinction, by . . . the cost of operating two signals for an extended period”); Univision at 3 (“enormous costs [are] involved in . . . operating two stations during the transition”).

<sup>36</sup>*See, e.g.*, *Kraemer Report* at 22. Even that amount may be significantly overstated. *See, e.g.*, Michael Groticelli, *Affordable DTV is a Reality*, Broadcasting & Cable, Apr. 23, 2001, at 40 (“One small-market broadcast company in Kingsport, Tenn., understands the need to make the transition quickly and has done so for less than \$125,000.”). NAB itself has elsewhere reported that “[a] majority of stations (three-quarters or more) reported that they did not have difficulties in securing the necessary capital financing for their station’s DTV station construction.” Chris Ely, NAB, *2000 DTV Implementation Survey Report* (May 2000), at <http://www.nab.org/Research/topic.asp#DIGITAL>.

broadcasters must be relying on the ongoing costs of *operating* the additional antenna.

Broadcasters mention only one cost item: power bills.<sup>37</sup> But broadcasters fail to provide *any* argument or evidence on the size of the burden involved. And there is every reason to believe that the burden is small: in many cases, as little as \$10,000 per year.<sup>38</sup>

The notion that this small expenditure will impose a significant burden on a substantial number of broadcasters is implausible. Whether due to analog must-carry, retransmission-consent, or otherwise, broadcasting is a financially healthy industry. In 1999 (the most recent year for which data are available), stations in the top 10 markets averaged earnings before taxes amounting to 44 percent of revenue.<sup>39</sup> Although stations in lower-ranked markets did slightly less well, they still enjoyed enviable returns: for example, in markets 11- 40, the

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<sup>37</sup>See, e.g., Public Broadcasters at 21 (“public stations, for whom the energy bills of dual transmissions are overwhelming, will be unable to sustain their dual operations”). Broadcasters also hint that, if the transition turns out to be particularly prolonged, analog broadcasting facilities may need to be replaced. See, e.g., *Kraemer Report* at 23 (“the analog transmitter may need replacement, and the useful life of the replacement will exceed most likely the residual period during which the station must operate an analog service”). There is, however, every reason to believe that any such replacement lies far in the future and can be dealt with when necessary.

<sup>38</sup>See, e.g., *Amendment of Section 73.622(B), Table of Allotments, Digital Television Broadcast Stations (Calais, Maine)*, Notice of Proposed Rulemaking, MM Docket No. 01-167, 2001 WL 856144, ¶ 2 (FCC rel. July 31, 2001) (involving request by broadcaster for permission to use different frequency so as to be able to lower power bill from \$35,000 to \$25,000 annually); *Amendment of Section 73.622(B), Table of Allotments, Digital Television Broadcast Stations (Orono, Maine)*, Notice of Proposed Rulemaking, 15 FCC Rcd 23793, ¶ 2 (FCC rel. Dec. 4, 2000) (“MPBC contends that use of VHF DTV channel 9 will cost MPBC \$15,768 per year”).

<sup>39</sup>See National Association of Broadcasters and Broadcast Cable Financial Management Association, *Television Financial Report*, Table 1 (2000).

average margin exceeded 20 percent.<sup>40</sup> Indeed, even stations in the smallest 35 markets (markets 176-210) averaged 17 percent margins.<sup>41</sup>

**D. Broadcasters' Analysis As to the Burden That a Dual-Carriage Requirement Would Impose Is Unpersuasive.**

1. With respect to the burden imposed by digital carriage, broadcasters' analysis is simple. *See* NAB at 31-32; Public Broadcasters at 22. They assert that, in recent years, many cable operators have been upgrading their systems to 750 MHz, and that these upgrades are now nearing completion. Moreover, they assert that cable operators have increasingly used compression in providing digital-cable packages. Thus, they claim, there is plenty of new cable spectrum becoming available, and a dual-carriage requirement can be implemented without displacing existing programming. For example, the Public Broadcasters rely on a study asserting that the upgrade from 550 MHz to 750 MHz adds about 35 new 6 MHz channels of cable spectrum, of which a dual-carriage regime would appropriate "only" about 12.<sup>42</sup>

Even disregarding that much of the new spectrum is already occupied by new services, *see* TWC at 22-23, broadcasters are wrong in suggesting that no harm is done so long as no existing use is displaced. In gauging the burden imposed by a dual-carriage regime, the

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<sup>40</sup>*Id.* Tables 1 through 4.

<sup>41</sup>*Id.* Table 16.

<sup>42</sup>*See* John H. Weber, Strategic Policy Research, *Cable TV Capacity* at 5 (June 7, 2001), *attached to Joint Reply to Oppositions to Petitions for Reconsideration of the Association of America's Public Television Stations, Carriage of Digital Television Broadcast Signals*, CS Docket No. 98-120 (FCC filed June 7, 2001).

Commission cannot ask only: “what is being carried now?” — it must go on to ask “what will be carried if no carriage requirement is imposed?” There are competing uses for new spectrum, including additional non-broadcast programming services (HDTV and SDTV), video-on-demand, cable-modem service, telephony, and digital music. Giving preferential rights to broadcasters necessarily means that some of these other uses must be foregone, for new spectrum is far from an inexhaustible commodity. As Discovery correctly points out, “if channel capacity were unlimited, broadcasters would not be requesting rules giving them preferential access.” Discovery at 7-8.

The result of giving broadcasters a preferential claim on new spectrum is necessarily a consumer-welfare loss. The innovative services for which cable operators use their new spectrum have proven extremely popular with consumers.<sup>43</sup> Instead of those services, consumers would receive SDTV programming that consists mostly of broadcast programming that they can already view in analog format in resolution that is just as good. Thus, as stated in the *CBO Report* on which broadcasters rely, a dual-carriage requirement would necessarily “lessen subscribers’ viewing choices.” *CBO Report* at 28. As economist Thomas Hazlett, one of the consultants to that report, explained to Congress, the “costs may be terribly high,

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<sup>43</sup>See, e.g., Ted Hearn, *Strong 2Q Growth for Digital*, MultiChannel News, Aug. 14, 2001 (“nearly 18 percent of U.S. cable subscribers have elected to purchase digital tiers, which typically include dozens of new video and music channels, electronic program guides and access to dozens of premium networks and pay-per-view movies”), at [http://www.tvinsite.com/multichannelnews/index.asp?layout=story&doc\\_id=41291&display=breakingNews](http://www.tvinsite.com/multichannelnews/index.asp?layout=story&doc_id=41291&display=breakingNews); AOL Time Warner Press Release, *Joseph J. Collins Named Chairman of New Interactive Video Division*, Aug. 16, 2001 (“enthusiastic reception to our initial Video-on-Demand and Subscription-Video-on-Demand services in test markets”), at [http://media.aoltimewarner.com/media/press\\_view.cfm?release\\_num=55252122](http://media.aoltimewarner.com/media/press_view.cfm?release_num=55252122).



soaking up valuable bandwidth on cable and satellite systems to distribute programming of little interest to consumers.”<sup>44</sup>

More fundamentally, bandwidth additions result from investment by cable operators placing privately raised capital at risk without any guarantee of a return. To this end, cable operators have invested \$42 billion since 1996, and \$12.4 billion in 2000 alone.<sup>45</sup> They did so not for the sake of adding surplus bandwidth; rather, they did so in the pursuit of business plans carefully comparing costs to the predicted revenue that can be generated by providing innovative new services. If as much as one-third of new bandwidth may be appropriated, these plans will be thwarted, and incentives to invest in future bandwidth additions obliterated. That result would be directly contrary to important policy goals endorsed by Congress. *See* 47 U.S.C. § 157(a); *cf.* Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (codified at 47 U.S.C. § 157 note).

2. Broadcasters also argue that “the relative burden of carrying both DTV *and* NTSC signals will be *less* than the initial burden of carrying only analog signals.” NAB at 34; *see also* Public Broadcasters at 10-11. That claim, however, is based on a simplistic summing of the total number of broadcast signals carried — whether voluntarily or not — as a percentage of total cable capacity. But that is not the proper comparison. The “channels occupied by

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<sup>44</sup>Testimony by Thomas W. Hazlett ¶ 8, *Hearing on the Transition to Digital Television Before the Senate Committee on Commerce, Science and Transportation*, 107th Cong. (Mar. 1, 2001), at <http://www.senate.gov/~commerce/issues/telco.htm#Hearings>.

<sup>45</sup>*See* AT&T at 6 n.4; Statement of Michael S. Willner, President and CEO of Insight Communications, at 2, *Hearing on the Transition to Digital Television Before the Senate Committee on Commerce, Science and Transportation*, 107th Cong. (Mar. 1, 2001), at <http://www.senate.gov/~commerce/issues/telco.htm#Hearings>.

added broadcasters represent the actual burden of the regulatory scheme.” *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 215 (1997) (“*Turner II*”). Thus, the proper measure of the burden of a new carriage requirement focuses on the additional stations required to be carried that would not be carried voluntarily.

Measured that way, the burden of a dual-carriage requirement would be much more severe than the requirement that became effective in 1993. *See* TWC at 20-21. At that time, cable operators already carried the vast majority of analog signals voluntarily: of the more than 35,000 channels carried on cable, only 5,880 involved signals that would not otherwise have been carried; cable operators nationwide carried 99.8 percent of the programming they carried before enactment of must-carry; and 94.5 percent of all cable systems had not had to drop programming in order to fulfill their must-carry obligations. *See Turner II*, 520 U.S. at 214. In contrast, few digital signals are currently being carried. Although additional retransmission-consent agreements can be expected as the transition continues, it is unlikely that the number of digital signals voluntarily carried will soon equal the number of analog signals carried.

## **II. A DUAL-CARRIAGE REQUIREMENT WOULD EFFECT AN UNAUTHORIZED TAKING OF PRIVATE PROPERTY.**

TWC has previously explained that requiring cable operators to carry digital broadcast signals would constitute a *per se* taking of private property without just compensation: it would constitute a physical occupation of the cable plant over which those signals are transmitted.<sup>46</sup> Univision now responds that “there is no specific physical location in . . . cable systems that is

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<sup>46</sup>*See* TWC 1998 Comments at 26-29; *see also* NCTA at 21-25.

‘occupied’ as a result of must-carry rules.” Univision at 20. But Univision cannot deny that must-carry signals are transmitted through the cable operator’s tangible cable lines. Thus, “the insertion of local stations’ programs into a cable operator’s line-up” is not “a metaphysical act” — it “takes place on real property.”<sup>47</sup> Contrary to what Univision says (at 20-21), there is also no requirement that the invasion of property be made by a “tangible object.”<sup>48</sup>

Univision next claims that, even if a carriage requirement does effect a physical invasion, it does not necessarily constitute a taking. *See* Univision at 21. But that argument flies in the face of *Loretto*, where the Supreme Court held that a government-mandated invasion of private property is a *per se* taking. The single decision on which Univision relies holds only that regulation of rates charged in a consensual landlord-tenant relationship is not a *per se* taking (though it might still amount to a regulatory taking if the rates are confiscatory), where the property owner is not compelled to give access to its property. *See FCC v. Florida Power Corp.*, 480 U.S. 245, 252-53 (1987) (“The line which separates [this] case[] from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license.”).

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<sup>47</sup>*Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32, 67 n.10 (D.D.C. 1993) (Williams, J., dissenting), *vacated on other grounds*, 512 U.S. 622 (1994); *see also Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1058 (8th Cir. 1978) (holding requirement that cable operators expand channel capacity to accommodate public-access channels to constitute a taking), *aff’d on other grounds*, 440 U.S. 689 (1979).

<sup>48</sup>*See, e.g., United States v. Causby*, 328 U.S. 256, 265 (1946) (noise caused by airplane overflights constituted taking because the “intrusion [was] so immediate and direct as to subtract from the owner’s full enjoyment of the property and to limit his exploitation of it”).

Univision also contends that the invasion is not “permanent” but rather “temporary” because “it would exist only until the conclusion of the DTV transition.” Univision at 23-24. But a taking short of perpetuity is no less a taking; it is well established that the length of the deprivation affects only the amount, not the requirement, of just compensation. *See, e.g., First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318 (1987) (“‘temporary’ takings . . . are not different in kind from permanent takings”); *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 657 (1981) (“temporary reversible ‘takings’ should be analyzed according to the same constitutional framework applied to permanent irreversible ‘takings’”).

### **III. PROGRAM-RELATED DIGITAL MATERIAL IS NOT ENTITLED TO CARRIAGE AT ALL.**

To obtain guaranteed cable carriage of just about anything they wish to transmit, broadcasters urge an exceedingly broad interpretation of the term “program-related material” in Section 614(b)(3)(A). *See, e.g.,* NAB at 38-41; Public Broadcasters at 23. Some broadcasters candidly acknowledge that they ask the Commission to adopt a broad reading of the “program-related” standard to undo the Commission’s decision that “primary video” excludes broadcasters’ multicast streams. *See* Public Broadcasters at 23.<sup>49</sup> In doing so, broadcasters assert carriage rights for “all content, including interactive advertising content,

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<sup>49</sup>They do so even though the Commission’s “primary video” holding was unquestionably correct and finds strong support in the language of Section 309(j)(14)(B)(iii)(I). That section speaks of carriage of “one of the digital television service programming channels of each of the television stations broadcasting such a channel.” *Id.* Congress would not have used that language if it had thought that, despite the “primary video” limitation, all multicast channels must be carried.

that is contained within a broadcaster's free, over-the-air digital signal and transmitted for the purpose of attracting and maintaining viewership." Disney at 3-4; *see also* Gemstar at 4; CEA at 8; Entravision at 7; Paxson at 2; NHL/PGA at 3; NFL at 4.

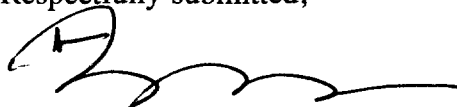
That claim is contrary to the statute. As TWC has explained, the Commission may not require carriage of *any* "program-related material" unless it is a part of the primary-video transmission of a digital signal. That is because the only program-related material that Section 614(b)(3)(A) requires to be carried is that in the "vertical blanking interval," which digital signals do not contain. *See* TWC at 28; Time Warner Cable's Petition for Reconsideration at 3, CS Docket No. 98-120 (FCC filed Apr. 25, 2001).

Besides, the broadcasters' proposal is inconsistent with the narrow scope of program-related material in the analog context. *See* TWC at 29-30; NCTA at 30. At most, program-related material could include the closed-captioning, V-chip, SID Code, and PSIP materials listed in paragraph 61 of the *Order*. *See* TWC at 30. There is no evidence that Congress intended to allow broadcasters to smuggle large amounts of non-primary video into the must-carry stream — let alone multicast streams that may consume as much as five times the bandwidth of the primary video transmission. *See id.*

## CONCLUSION

For the reasons set forth above (as well as the reasons set forth in TWC's opening comments and 1998 opening and reply comments), the Commission should not require cable operators to carry digital broadcast signals during the transition period.

Respectfully submitted,



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Henk Brands  
Scott K. Attaway  
Kellogg, Huber, Hansen,  
Todd & Evans, P.L.L.C.  
1615 M Street, N.W.  
Suite 400  
Washington, D.C. 20036  
(202) 326-7945

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